IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 823 of 2003

with

CRIMINAL APPEAL No 824 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE N.G.NANDI
and
HON'BLE MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ABDUL RAHMAN ABDUL MAJID DHANTIYA

Versus

STATE OF GUJARAT

Appearance:

MR VIJAY PRADHAN with MR MA KHARADI for Appellants

MR AD OZA, PUBLIC PROSECUTOR for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE N.G.NANDI
and
HON'BLE MR.JUSTICE M.C.PATEL

Date of decision: 01/10/2003

C.A.V. JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.C.PATEL)

1. These two appeals under Section 34 of the Prevention of Terrorism Act, 2002 (POTA) are directed against orders dated 20th June, 2003 passed by the Special Court in Criminal Miscellaneous Applications No.1134 of 2003 and 1135 of 2003 whereby the Special Court rejected the said applications for bail filed by the appellants.

2. The appellant in Criminal Appeal No.823 of 2003 is Abdul Rahman Abdul Majid Dhantiya and Criminal Appeal No.824 of 2003 is filed by Abdul Rahman Yusuf Dhantiya. We shall refer to the two appellants as Abdul Majid and Yusuf.

3. A ghastly incident took place at about 7.45 a.m. on 27th February, 2002 when the Sabarmati Express was stopped near Godhra Railway Station and a coach was set on fire resulting in the death of 59 persons and serious injuries to 48 others. An F.I.R. was lodged on the basis of which a case was registered as C.R. No.I-09 of 2002 under Sections 143, 147, 148, 149, 337, 338, 435, 120-B, 34, 153(A), 302, 307 I.P.C., Sections 141, 151, 152 Indian Railways Act, Sections 3 and 4 of Prevention of Damage to Public Property Act and Section 135(1) of the Bombay Police Act.

4. After investigation, the first chargesheet was filed on 22nd May, 2002 and both the appellants were shown as accused involved in the case. But it was specifically mentioned therein that investigation was still continuing. Thereafter, a number of supplementary chargesheets have been filed. On the basis of the facts revealed as a result of further investigation, the prosecution came to the conclusion that offences under Sections 3(2) and 3(3) and Section 4 of the POTA had also been committed and accordingly took appropriate steps for including the aforesaid offence. It appears that, initially, before the offences under POTA were added, the appellants had moved applications for bail before the learned Additional Sessions Judge, Panchmahals but they were rejected by order dated 15th January, 2003. The appellants moved fresh applications for bail on 15th May, 2003 before the Special Court after the offences under POTA were added.

5. Abdul Majid filed Criminal Miscellaneous Application No.1134 of 2003. It was averred in the application that he was an innocent person and had been falsely implicated, that he is a permanent resident of Godhra and is a reputed person of the society and has no criminal antecedents. It was submitted in the application that P.S.I. Jhala had named the applicant in his statement and thereafter Constable Mangal and another Constable Vinubhai had disclosed the name of the applicant in their respective statements. It was submitted that the statements have been fabricated. It was stated that at the time of the occurrence of the offence, some active workers of Vishwa Hindu Parishad were present on the platform and that since the applicant was a sitting Councillor of Godhra Municipality, he could have been identified by the former President of Godhra Municipality Raju Darji and other persons whose statements have been recorded by the police but none of them have stated anything against him.

6. Yusuf filed Criminal Miscellaneous Application No.1135 of 2003 before the Special Court. His case was that he was an agriculturist whose land was situated very near to 'A' Cabin where the incident occurred and in his field, a well was situated from where he had given the water to get the fire extinguished. He averred that he was a regular supplier of water to various industries and at the time of the incident, he was present in Shriram Industries.

7. Both the applications for bail were opposed by the Special Prosecutor.

8. Before the learned Special Judge, it was contended on behalf of Abdul Majid that he was a sitting Councillor of Godhra Municipality and was a responsible citizen and that he had been falsely involved in the said offence with a malafide intention. It was contended that he was charged earlier in the offence registered as C.R. No.66 of 2002 of Godhra Town Police Station for being a part of the mob registered on the same day for the alleged incident that took place between 9.30 and 10.00 a.m. and that he had been acquitted by the Sessions Court. It was submitted that neither in the statement given by the witnesses under Section 164 before the Chief Judicial Magistrate, Godhra nor in the statement given under Section 164 by one of the accused, he had been named. It was submitted that statements of two of the standing Councillors were recorded on the very same day but he was not named therein. The learned Special judge, after referring to circumstances appearing from the

prosecution case, observed that the applicant Abdul Majid had been named by one P.S.I., one Head Constable and two Police Constables. He was also alleged to have instigated the mob at the time of the incident and in the course of investigation, a plastic container was discovered at his instance. The learned Special Judge observed that it would not be possible to hold that the accused, prima facie, was not guilty of any offence under POTA. In the alternative, the learned Special Judge said that even if POTA had not been applied and the application was to be considered simply under Section 439 of the CrPC, the applicant will not be entitled to bail. The bail application of Yusuf was also rejected with similar observations.

9. Mr. Vijay Pradhan, the learned counsel for the appellants submitted that the appeal under Section 34 of the POTA lies both on facts and on law and there is no fetter on the power of the Appellate Court to come to an independent conclusion. He submitted that the question was whether POTA was rightly invoked against the two appellants. He contended that the provisions of sub-sections 2 and 3 were not attracted in the case of the appellants. He contended that the plastic container which was allegedly discovered at the instance of Abdul Majid had not been sent to Chemical Analyser, that it was a joint panchnama by a number of accused and the discovery was from an open place accessible to public and that the alleged discovery was meaningless. He contended that presumption under Section 53 can be drawn only on the identity of the material. He also made submissions on the statements of three witnesses namely, P.S.I. Mohabatsinh, Head Constable Mangalbhai Ramjibhai and Police Constable Vinubhai who had implicated Abdul Majid. He contended that the statement of Mohabatsinh was recorded after three days, that his statement does not reveal that the appellant was present when the compartment was set ablaze, that, though the appellant was a Corporator, he was not referred to by name but he was referred to by his nickname namely, Kankatto Jamburo, that only a vague allegation of instigating the mob have been made and no particulars of instigations have been given. He said that in the statement of Mangalbhai Ramjibhai there was an allegation of instigating miscreants but there was no reference to the coach being set ablaze. He contended that no test identification parade had been held.

10. He contended that the requisite intention is an essential ingredient of definition of the terrorist act, as defined under Section 3(1) of the POTA. He contended

that the appellants were not members of unlawful assembly when the act of causing fire was committed. The object of unlawful assembly may change during the course of the incident. There was no intention on the part of the appellants to commit the act, as defined in Section 3(1) of the Act and no overt act has been attributed to them. He submitted that the appellants do not figure in the three statements recorded under Section 164 of CrPC. He cited the decision of the Supreme Court in the case of HITENDRA VISHNU THAKUR AND OTHERS vs. STATE OF MAHARASHTRA AND OTHERS [1994 SCC (Cri.) 1087] and contended that it must be shown that the crime was committed with the intention as envisaged by Section 3(1) of the Act to achieve the objective as envisaged by the said Section. He drew our attention to several paragraphs of the judgment including para 14 where it was held that the Designated Court must record its satisfaction about the existence of a prima facie case on the basis of the material on the record before it proceeds to frame a charge-sheet against an accused for offences covered by TADA. He also read the statements of a number of passengers travelling in the coach to show that there was some incident involving the karsevaks and the Muslim tea vendor and the ghastly act followed thereafter. He submitted that, since more than a year had elapsed since the date of arrest, the interrelation between subsection 6 and 7 of Section 49 of the POTA had changed.

11. As for Yusuf, the appellant in Criminal Appeal No.824 of 2003, it was contended that he had a very good defence of alibi and that he had gone to the place of incident to put out the fire. It was contended that he had been implicated in the statement of only one witness, Police Constable Punjabhai and not in three statements as observed by the Special Judge. On behalf of the appellants, the following decisions were cited.

(1) S.P. SINHA AND OTHERS vs. STATE OF MAHARASHTRA [AIR 1992 SC 1751],
(2) MASALTI vs. THE STATE OF UTTAR PRADESH [AIR 1965 SC 202],
(3) ANTHONY AND OTHERS vs. THE STATE [1993 CRI.L.J. 1828] and
(4) BHAGIRATHSINH JUDEJA vs. STATE OF GUJARAT [AIR 1984 SC 372]

12. Mr. A.D. Oza, the learned PP submitted that there was a pre-planned conspiracy, as revealed in the statements recorded under Section 164 of the CrPC, that persons involved in the conspiracy may not be known to

each other, that 48 accused were still absconding and the possibility of tampering with the witnesses cannot be ruled out. He submitted that Abdul Majid was instigating others and Yusuf was caught on the spot. He contended that there is a prima facie case against the appellants and they are not entitled to be released on bail in such a serious case. He cited the following decisions:

(1) CHANDRA BIHARI GAUTAM AND OTHERS vs. STATE OF BIHAR [2002 CRI.L.J. 2541],
(2) PRAHLAD SINGH BHATI vs. NCT, DELHI AND ANOTHER [[(2001) 4 SCC 280],
(3) THE STATE (THROUGH DEPUTY COMMR. OF POLICE SPECIAL BRANCH, DELHI) vs. JASPAL SINGH GILL [AIR 1984 SC 1503],
(4) RAM PRATAP YADAV vs. MITRA SEN YADAV & ANR. [2003 (1) GLR 514],
(5) STATE OF MAHARASHTRA vs. CAPTAIN BUDDHIKOTA SUBHA RAO [1989 Supp (2) SCC 605],
(6) KRISHNA MOCHI AND OTHERS vs. STATE OF BIHAR [2002 CRI.L.J. 2645] and
(7) STATE OF GUJARAT vs. LALJI POPAT & ORS. [1988 (2) GLR 1073].

13. Now, the statement of the co-accused Jabir Bin Yamin Behra which was recorded by the learned Magistrate in Godhra on 5th February, 2003 shows that the plan and preparations to attack the train and set fire to the coach were made on the previous day when about 140 litres of petrol was bought and stored. Prima facie, the act of setting the coach ablaze was in pursuance and execution of the said plan. The fact that soon after the train left the station it was stopped near the signal where a huge mob of 1000 persons was ready to attack it also indicates prior concert to commit the act. The coach was full of karsevaks and they were overpowered and prevented from leaving the coach by the mob and the dastardly act could not have been committed without the active assistance of such a huge mob. Intention is a matter of inference to be drawn from the circumstance. Prima facie, the act of attacking and setting fire to the coach was calculated and intended to strike terror among a section of the people and would prima facie fall under Section 3(1) of the POTA. The presence of Abdul Majid in the mob is revealed in the statements of witnesses and he is alleged to have been instigating others. Yusuf is also alleged to have been in the mob and caught on the spot. The incident has to be viewed as a whole and, prima facie, the incident cannot be split into different parts at this stage and it cannot be said that the appellants were not members of the unlawful assembly

which committed the act of attacking and causing fire. And, prima facie, the appellants will be liable as members of the unlawful assembly for the said act. The applicability of Section 149 in their case for fastening liability on them for setting fire to the coach cannot be ruled out at this stage. This is not the stage to weigh the material collected during the investigation. The contentions which have a bearing on the probative value of the material relied upon by the prosecution will be considered by the Trial Court while appreciating the evidence at the end of the trial. The defence of alibi also will be considered at that time. Even if POTA had not been applied, the appellants would not be entitled to be released on bail in such a serious case.

14. In our opinion, the Special Court has not committed any error in rejecting the bail applications of the appellants. The appeals are, therefore, dismissed.

(N.G. Nandi, J.)

(M.C. Patel, J.)

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